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Nos. 94-631, 94-797, and 94-929

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Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, ET AL.,

Appellants,

vs.

DAVIDA JOHNSON, ET AL.,

Appellees.

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF APPELLEES

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vs.

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On Appeal From The United States District Court
For The Southern District of Georgia

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS*

This brief is submitted on behalf of the Anti-Defamation League ("ADL") as *amicus curiae*. Pursuant to Rule 36.2 of the Rules of this Court, ADL has obtained and files herewith the written consent of all parties to this appeal to the submission of this brief.

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons, whether they are members of a minority or of the majority, and in assuring that each individual receives equal treatment under the law regardless of that person's race, ethnicity, or religion. ADL advocates that each citizen has a constitutional right to be treated as an individual, rather than as a component part of a racial or ethnic group.

Among its many activities directed to these ends, ADL has filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *De Funis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighter's Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). In the area of voting rights, ADL has filed *amicus* briefs in *Cardona v. Power*, 384 U.S. 672 (1966); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); and most recently in *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994).

ADL submits this brief to advance its conviction that redistricting substantially motivated by racial considerations impairs the liberties secured by the Equal Protection Clause of

the Fourteenth Amendment to the United States Constitution. In ADL's view, such state action offends core equal protection principles, is inimical to democratic values, and undermines the fundamental importance of the franchise to our society and democratic system of government.

In taking this position, ADL strongly reaffirms its principled adherence to a policy opposing racial classifications of all kinds. Although ADL recognizes that the goal of increasing specific minority group participation in the political process is commendable, ADL equally insists that racial classification in redistricting—the premise of maximization and proportionality—is constitutionally indefensible and, in the end, will defeat the laudable motives of the appellants. The presumption that *only* a member of a certain race can or will effectively represent his or her constituents of that same race is antithetical to the goal of a society—and a Constitution—blind to racial classifications.

STATEMENT

Following the 1990 Census, the State of Georgia became entitled to an increase in the number—from ten to eleven—of its seats in the United States House of Representatives. *Johnson v. Miller*, 864 F. Supp. 1354, 1360 (S.D. Ga. 1994). The Georgia General Assembly convened in August 1991 to create an eleventh district and, pursuant to the preclearance requirements of Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973b-c ("Voting Rights Act"), submitted a redistricting plan to the United States Department of Justice ("DOJ") on October 1, 1991. *Id.* at 1363. DOJ refused preclearance. *Id.*

The Georgia General Assembly approved and submitted a second plan to DOJ on March 3, 1992. *Id.* at 1364. Both the first and the second plans contained two majority black districts, the Second District and the Fifth District. DOJ again refused preclearance. *Id.* at 1365. Georgia prepared and submitted a third plan on March 31,

1992. This plan contained three majority black districts, the Second, Fifth, and Eleventh Districts. DOJ approved the third plan on April 2, 1992. *Id.* at 1367.

The Georgia legislature had adopted redistricting guidelines and objectives that it adhered to throughout the legislative redistricting process. *Id.* at 1360. After the first plan was rejected by DOJ, however, one of these objectives became predominant: It "soon became obvious" that no plan would gain preclearance by DOJ unless the Eleventh District included a majority of blacks of voting age. *Id.* at 1363-64.

The district court found, and the parties do not seriously dispute, that the revisions that the Georgia Assembly made to its initial plan in order to obtain DOJ preclearance were "purely race-based." *Id.* at 1377. In its brief in this Court, Georgia concedes that "[t]he only real dispute concerning the general question of race and congressional reapportionment related to whether Georgia should have two or three majority black districts"; that "the general objective of enacting a majority-minority [Eleventh] district [in the third and final plan was] never in dispute"; and that "it is indisputably true that the Eleventh District was purposely drawn as a majority-minority district." Brief of Appellants Miller, et al. ("Miller Br.") at 8, 9-10, 23; *see also* Brief of the United States ("U.S. Br.") at 6 ("In enacting this plan, the State clearly intended to create three majority-minority districts.").

That the redistricting plan was expressly adopted in order to manipulate election results along racial lines is also not subject to dispute. Thus, the Speaker of the Georgia House of Representatives testified at trial that certain district boundaries were drawn based upon race in order to "guarantee a black would be elected from there." 864 F. Supp. at 1377.

Appellees commenced their action in the district court on January 13, 1994. *Id.* at 1369. They alleged, among other things, that adoption of the third plan and the creation of the

Eleventh District for the reasons set forth above violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 1359.

Observing that the Eleventh District was the product of "government allocations on the basis of race, coupled with drawing lines tracing concentrations of black citizens, smack[ing] of government-enforced ghettoization," the district court determined that the redistricting plan, insofar as it was designed for the primary purpose of creating a third majority-minority district, was subject to constitutional strict scrutiny. *Id.* The district court analyzed the third plan under that standard and, finding that it did not survive such strict scrutiny, held that the plan was violative of the Equal Protection Clause. *Id.* at 1393.

This appeal followed.

SUMMARY OF ARGUMENT

Having demonstrated by its adoption of the first and second plans that it could design a constitutionally sound redistricting scheme that resulted neither in minority dilution nor minority retrogression in violation of the Voting Rights Act, the Georgia legislature may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, modify that plan and redraw district boundaries based predominantly on racial considerations. Georgia concedes that the third plan and the Eleventh District were products of a racial classification and not of a traditional combination of various districting principles. Race was the substantial and motivating factor in the adoption of the third plan and the creation of the Eleventh District.

The constitutional right of the vote is fundamental to our system of democratic self-government. The voting right must be protected from attempts, however broadly favored or well-intentioned, to manipulate the predicted results of elections according to race. Appellants' premise—that the Constitution will tolerate the third plan's race-based creation

of political majorities—is repugnant to and unacceptable in this nation's democratic system of representative self-government.

The Court's equal protection jurisprudence furnishes the proper standard of review with respect to Georgia's legislative action. Whenever state action outside the context of redistricting has any racially discriminatory intent or purpose, it invokes strict scrutiny. Legislatures are always *aware* of race in redistricting, just as they are aware of other demographic factors; yet states may not racially gerrymander. When race is the substantial or motivating factor in redistricting, strict scrutiny is compelled under the Equal Protection Clause.

Nothing in the Voting Rights Act exempts a state from satisfying the principles enunciated by the Equal Protection Clause. DOJ's mandates and regulations do not and cannot immunize a state from the requirement that it comply with rudimentary and well settled Equal Protection Clause principles in the creation of voting districts.

This Court has never held that the use of race as the substantial or motivating factor in redistricting is constitutionally permissible. Intent to segregate the electorate according to race, however established, is a necessary element of a cause of action for violation of the Equal Protection Clause in the redistricting context. The facially irregular shape of a voting district is one, but not the only, method for establishing such intent; it is not an element of a claim. Where racial intent or purpose is the predominant motive behind state action in redistricting, an equal protection claim is stated.

ARGUMENT

GEORGIA'S ADOPTION OF THE THIRD PLAN AND CREATION OF THE ELEVENTH DISTRICT VIOLATED EQUAL PROTECTION PRINCIPLES AND THEREFORE PROPERLY TRIGGERED STRICT SCRUTINY BECAUSE THE LEGISLATURE USED RACE AS THE SUBSTANTIAL OR MOTIVATING CONSIDERATION IN REDISTRICTING

It is axiomatic that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). This appeal requires the Court to apply this fundamental precept to redistricting. The Court must determine whether a state may use a racial classification as its primary motive in adopting a redistricting plan.

ADL emphatically agrees with the district court's central holding that "in order to invoke strict scrutiny, it must be shown that race was the *substantial or motivating consideration* in creation of the district in question." *Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994) (emphasis in original) (footnote omitted). The court properly explained that, where the state legislature "(a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding, predominant force* determining the lines of the district," strict scrutiny is compelled. *Id.* (emphasis in original). It bears emphasis that the court used the term "'motivating' in the sense that race was the most prominent element driving the legislature's planning, not in the sense of one motivation among others of equal strength propelling the process." *Id.* at 1372 n.19.

Appellants criticize "the rule of law [the district court] adopts, which holds that racial purpose is the controlling issue." Miller Br. at 30. The district court properly focused

on discriminatory legislative intent or purpose as the touchstone of the inquiry. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). Where a state has adopted a districting plan that conforms to all traditional redistricting standards and requirements—as Georgia may have done here in the first and second plans—and in the absence of a finding of unlawful dilution or retrogression, it was constitutionally impermissible for that state to modify that redistricting plan and adopt a different one where race was the substantial or motivating consideration in doing so.

Whatever features the third and final plan shared with the first and second plans—such as relative size, length and contiguity of borders, respect for incumbency, intactness of counties, even "bizarreness" of shape—can for the purpose of this analysis be set to one side. The first and second plans may have been the result of the "pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 114 S. Ct. 2647, 2661 (1994); clearly the third was not. The primary and substantial motivation of the third plan, constitutionally differentiating it from the others, was to classify the electorate according to race. ADL argues that Georgia may not approve a voting district that was created with such an intent or purpose.

This point—vital to the constitutional analysis offered by ADL—merits elucidation. This appeal does not raise the issue, set forth in the United States' brief, of whether "*a* 'predominant motive' to create a majority-minority district alone requires strict scrutiny." U.S. Br. at 13 (emphasis added). The district court condemned state action where race was *the* substantial or motivating consideration in creating the district in question—where race was *the* overriding and predominant force determining the lines of the district. *Johnson*, 864 F. Supp. at 1372. Race was merely one of several considerations in adopting the first two plans; when

these plans were rejected and the third plan was adopted, however, race was *the* substantial and motivating consideration. This the Constitution will not permit, absent compelling justification and narrow tailoring.

A. Georgia's Third Plan Constitutes A Racial Classification Antithetical To Our Democratic System Of Representative Self-Government.

This case presents a racial classification strikingly similar to that condemned by the Court nearly thirty-five years ago in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Gomillion*, the Court struck down a realignment of the boundaries of a political subdivision effected by legislation "solely concerned with segregating white and colored voters by fencing Negro citizens out." *Id.* at 341. Whether the action of the Georgia General Assembly is characterized as fencing black voters in, or fencing white voters out, such an objective was patently the predominant concern of the legislature when it modified the second plan and adopted the third, and it is therefore constitutionally suspect.

As Justice Frankfurter wrote for the *Gomillion* Court, "[w]hen a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Id.* at 346. Although *Gomillion* was decided under the Fifteenth Amendment, the Court has explicitly recognized that the "unlawful segregation of races of citizens" into different voting districts is equally offensive in the Fourteenth Amendment context. *Shaw v. Reno*, 113 S. Ct. 2816, 2825-26 (1993) (quoting *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring)). This Court has held that *Gomillion* supports the contention that where district lines are obviously drawn for the purpose of separating voters by race, scrutiny under the Equal Protection Clause is mandated. *See id.* at 2826.

Appellants seek to avoid this logic by persuading the Court that Georgia's explicit race-conscious conduct in racially

manipulating the vote had a benign motive; they seek to disguise the offensiveness of the conduct by using inoffensive language to characterize it. The United States terms the third plan merely an indication that Georgia was "willing to treat minority interests on a par with those of other groups for whom majority influence districts are created." U.S. Br. at 14. It further argues that Georgia has not "taken action that gives a special preference to [blacks] that it is unwilling to give to others who are similarly situated." *Id.* at 20.[1] The United States would have this Court conclude that a state acts properly when it racially manipulates voting districts "in an effort to achieve a fair allocation of political power between white and nonwhite voters." *Id.* at 39.

It emphatically is *not* the domain of the State of Georgia or of the United States to "allocate political power" on the basis of race. Political majorities exist; they are not "created." The democratic system assumes that the interests of majorities are given voice through the franchise, not manipulated through a process by which "majority influence districts are created." Such an argument relies upon precisely the offensive logic and race-infected presumptions that *Shaw* denounced:

> It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc

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[1] The United States also attempts to justify the third plan as a way "to give minority voters an opportunity to elect the candidates of their choice." *Id.* at 42. This contention is disingenuous. Residents of the newly-created Eleventh District could always vote for the candidate of their *choice*. In fact Georgia was seeking to assure the *election* of a candidate of a particular *race*.

> voting that majority-minority districting is sometimes said to counteract.

Shaw, 113 S. Ct. at 2827.[2]

The Court has not tolerated in the past, and should not now tolerate, "the deliberate segregation of voters into separate districts on the basis of race." *Id.* at 2824. In the exercise of the self-determinative voting right, "[t]he vice [of unconstitutional race-specific state action] lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls." *Anderson v. Martin*, 375 U.S. 399, 402 (1964) (barring Louisiana from putting on a ballot opposite a Negro candidate's name the word "Negro" because it was a device that encouraged racial discrimination).

As *Shaw* notes, racial classifications in redistricting are "altogether antithetical to our system of representative democracy." 113 S. Ct. at 2827. Justice Douglas, in his dissent in *Wright v. Rockefeller*, expounded upon this principle in language that has particular force to this appeal:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

376 U.S. 52, 67 (1964) (Douglas, J., dissenting). If the Equal Protection Clause is to have actual meaning in our society,

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[2] Even if, as the United States argues, districting is the process of fairly allocating political power, the Equal Protection Clause prohibits political power allocated on the basis of race. *See* discussion *infra* Point B.

surely a fundamental principle that it enunciates is the right of all citizens to participate in an electoral process that is not substantially dominated by racial considerations.

B. The District Court Correctly Applied The Equal Protection Principles That Have Been Articulated By This Court.

Appellants argue that "the district court's reliance on cases outside the voting area for its view that race-motivated districting is unconstitutional is misplaced." Miller Br. at 34. ADL submits, to the contrary, that the equal protection principles articulated in the Court's Equal Protection Clause decisions furnished the district court with the correct standard to be applied in redistricting cases.

The district court noted that "[i]f race, however deliberately used, was one factor among *many of equal or greater significance* to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny." *Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994). However, where racial motivation was of substantially greater importance to the state than any other factor it considered in drawing the district, strict scrutiny is required. *Id.* Thus, the district court properly focused its inquiry "on the relative weight of the different motivations that produced the district under attack." U.S. Br. at 19.[3]

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court made abundantly clear that the Equal Protection Clause bars state action that has a "racially discriminatory intent or purpose." The Court held that the proper judicial inquiry is

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[3] The United States also argues that "[t]he fact that a state strongly desires to create a particular district with a majority-minority population says nothing about whether the state has taken action that amounts to a special preference for that group." U.S. Br. at 20. However, "special preferences" for a particular race are not the touchstone of the inquiry; that touchstone remains whether Georgia had an overriding "racially discriminatory intent or purpose" in adopting the third plan. It did.

what that state "purpose" was. 426 U.S. 229, 242 (1976). The Court reaffirmed the application of this principle in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, holding that where "a discriminatory purpose has been a motivating factor in the [legislative] decision," the Equal Protection Clause is violated. 429 U.S. 252, 265-66 (1977).

Strict application of this standard to redistricting cases that implicate the Voting Rights Act is not practicable, however, because, as the Court in *Shaw* observed, "the legislature always is *aware* of race when it draws district lines." *Shaw v. Reno*, 113 S. Ct. 2816, 2826 (1993) (emphasis in original); *see also United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 161 (1977) (recognizing that a state may use racial factors in redistricting without violating either the Equal Protection Clause or Section 5 of the Voting Rights Act). Hence, the *Shaw* Court noted that this "sort of race consciousness does not lead inevitably to impermissible race discrimination." 113 S. Ct. at 2826.

ADL acknowledges that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the single 'dominant' and 'primary' one." *Arlington Heights*, 423 U.S. at 265 (footnote omitted). Here, however, the parties concede that the Georgia legislature was motivated by a single consideration in modifying the second redistricting plan and adopting the third: race. Under the facts of this case, the Court need not engage in any weighing function. *Cf. id.*

On this appeal, the Court is presented with the opportunity to reaffirm and harmonize the standards it has enunciated in its equal protection jurisprudence. Because *Washington* and its progeny make clear that "racially discriminatory purpose or intent is required to show a violation of the Equal Protection Clause," *Arlington Heights*, 429 U.S. at 265, and because *Shaw* makes equally clear that not every

instance of race-conscious state action in redistricting gives rise to an equal protection claim, the analysis adopted by the district court was the proper one. Legislative decisions about redistricting may involve race awareness; it is only when race is *the* substantial or motivating factor in such decisions that strict scrutiny is compelled.

This standard properly erects constitutional protections against state-sponsored racial redistricting classifications that pose the clear danger of significant incursions on individual liberties. The standard allows legislatures to take into account competing considerations (including race) in the creation of voting districts, while at the same time protecting rights guaranteed by the Equal Protection Clause. It assures that racial classifications will not impair the constitutional right to participate in a fair electoral process.

Appellants nonetheless contend that a test of "intent" is unworkable. They claim that the so-called *Shaw* test of "bizarreness" is easier for a district court to apply. *E.g.*, U.S. Br. at 21-22 (courts cannot weigh "various goals the legislature was attempting to achieve" in adopting a particular districting plan, to determine which is "overriding," "predominant" or "most prominent"). This argument is unsupported by precedent or logic.

Courts regularly reach decisions on matters requiring proof of discriminatory intent. In Equal Protection Clause cases and in employment discrimination cases this Court has not hesitated to prescribe procedures, such as techniques of burden-shifting, to be used to evaluate the intent of a corporate or governmental entity. *See, e.g.*, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Arlington Heights*, 429 U.S. 252; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Washington*, 426 U.S. 229.

Moreover, a fact-finder's determination whether the shape of a district is "bizarre" also is an exercise in subjective weighing. What is "bizarre" is inherently a function of that

factfinder's subjective views.[4] For the purpose of the analysis offered by ADL, whether the shape of the Eleventh District is bizarre or not is of no constitutional import if that shape was determined for a predominantly race-conscious purpose. The constitutional principle is more decisively resolved by asking the right question in the first place: Did a legislature manipulate the composition of the electorate, motivated primarily or substantially by racial considerations?

Appellants have suggested no other principled test; they have advanced no reason, compelling or otherwise, to depart from this strong line of equal protection precedent and the well settled precepts this Court has articulated. Nor have they offered any rationale as to why these compelling authorities should be, either analytically or as a matter of policy, inapplicable to voting or redistricting. Plainly, they are directly apposite.

C. States Must Comport With Equal Protection Principles When Creating Voting Districts.

Shaw recognized that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw v. Reno*, 113 S. Ct. 2816, 2826 (1993) (emphasis in original). However, these differences do not mean that race-conscious redistricting cannot be subjected to the same type of strict scrutiny

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[4] Proof of this proposition may be found in the conflicting submissions made to this Court on this very appeal, in which appellants and *amici* continue to seek rulings on what is, purportedly, a question of fact: whether the Eleventh District is "bizarre." The district court found it unnecessary to reach this point and, ADL submits, this Court need not, should not, and in any principled way, cannot, make such a *de novo* finding on appeal.

accorded other race-conscious state action.[5] It is inconsistent with the purpose of the Equal Protection Clause, and with this Court's past rulings, to immunize a state from complying with equal protection principles because it obtained preclearance from DOJ, where DOJ's requirements themselves violate the Equal Protection Clause.

Here, DOJ's objections to Georgia's first and second plans were not based on a finding that those plans diluted black voting rights or caused retrogression of black voting power. *Cf.* 28 C.F.R. § 51.54(a) (defining "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" as the standard for finding discriminatory effect in redistricting). DOJ objected precisely because the plans failed to *enhance* black voting power to the extent DOJ believed appropriate. 864 F. Supp. at 1365. Yet neither the Voting Rights Act nor the Constitution ensures a right of proportional representation by race. *See Mobile v. Bolden*, 446 U.S. 55, 75 (1980) ("[t]he Equal Protection Clause of the Fourteenth Amendment does not require proportional representation"); 42 U.S.C. § 1973(b) ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

ADL therefore agrees with appellants when, with irrefutable logic, they observe that "[w]hat would otherwise be

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[5] The fact that the Court has tolerated race-specific state action in other social contexts does not alter this conclusion. *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (education), *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (employment); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (education). The franchise—the manner in which citizens participate in the process of self-government—is fundamentally different from these social concerns. It is fundamentally different precisely because it is the single political right preservative of *all* rights. *Harper v. Virginia St. Bd. of Elections*, 383 U.S. 663, 667 (1966) (referring to "'the political franchise of voting' as a 'fundamental political right, because [it is] preservative of all rights'") (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1896)).

unconstitutional surely is not made constitutional just because it might have been enacted in response to a DOJ objection." Miller Br. at 28. As this Court observed in *Shaw*, "the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional." 113 S. Ct. at 2831.

Furthermore, to extend the effect of the Voting Rights Act so as to grant states immunity from constitutional restraints when they claim to act pursuant to its supposed dictates is, effectively, to elevate a statute to a position supreme to the Constitution itself. The Voting Rights Act was designed to prohibit racial segregation in the franchise, not to effect it. In sum, it cannot legitimately be argued that a state may exempt itself from conforming to the Constitution by reciting that it violated the Equal Protection Clause in order to comply with a statute.

D. Nothing In *Shaw* Or *UJO* Precludes The Court From Affirming The Holding Of The District Court.

The facts of this appeal are distinguishable from the Court's prior holdings in this area. Precedent guides, but does not dictate, the determination of the vital issues raised herein.

In *United Jewish Organizations of Williamsburg, Inc. v. Carey* ("*UJO*"), the Court held that "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment." 430 U.S. 144, 161 (1977) (plurality opinion). In *UJO*, the Court upheld without subjecting to strict scrutiny a state's legislative redistricting plan that "deliberately used race in a purposeful manner" to create majority-minority districts in order to comply with Section 5 of the Voting Rights Act. *Id.* at 165. However, there was no claim in *UJO* that the creation of the

state's plan was motivated predominantly or exclusively by race.[5]

In *Shaw v. Reno*, the Court held that, "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. 2816, 2828 (1993). The *Shaw* Court's premise was consistent with the settled proposition that, once a voting district "can be explained only in racial terms," *Wright v. Rockefeller*, 376 U.S. 52, 59 (1964) (Douglas, J., dissenting), it can pass constitutional muster only if it survives strict scrutiny.

Thus, taken together, *UJO* and *Shaw* stand for the proposition that legislatures may consider race among other factors in redistricting, but that when redistricting may be rationally understood only as an effort to segregate the citizenry by race for the purpose of voting, without sufficient justification, a claim lies under the Equal Protection Clause. The Court has never expressed a view—and has explicitly reserved the question—as to whether the intentional creation of majority-minority districts in the absence of a finding of minority dilution or retrogression gives rise to an equal protection claim. *See Shaw*, 113 S. Ct. at 2828. The district court correctly answered this question by holding that where race is the "*substantial or motivating consideration* in creation of the district in question," strict scrutiny is compelled. *Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994).

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[5] The *Shaw* Court noted that "nothing in [*UJO*] precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." *Shaw v. Reno*, 113 S. Ct. 2816, 2830 (1993).

E. *Shaw* Did Not Add A New Requirement—Bizarreness Of Shape—To The Settled Elements Of An Equal Protection Claim.

Appellants, and the dissenting judge in the district court, argue that a *Shaw* claim arises only when racial redistricting motivations result in a bizarrely shaped district, such as the particular district at issue in *Shaw*. Miller Br. at 24-25; *Johnson v. Miller*, 864 F. Supp. 1354, 1395 (S.D. Ga. 1994) (Edmondson, J., dissenting). They suggest that the factfinder must make a subjective assessment of a district's "bizarreness" of appearance in order to satisfy what Judge Edmondson, in dissent, called "a critical part of the cause of action" under *Shaw*. *Johnson*, 864 F. Supp. at 1396 (Edmondson, J., dissenting). They contend that, without such an assessment, "not even a prima facie equal protection claim can be made out." Miller Br. at 24. *Shaw*, however, does not compel such a requirement. Shape may be one, but is not the only, barometer of unconstitutional intent.

Shaw presented a unique set of facts, one of the most prominent of which was a bizarrely shaped voting district. *Shaw v. Reno*, 113 S. Ct. 2816, 2820 (1993) (citing a description of the shape of the North Carolina plan at issue as resembling a "bug splattered on a windshield"). The *Shaw* Court had no occasion to rule upon the constitutionality of a substantially race-motivated voting district that was *not* bizarrely shaped. This does not compel the peculiar conclusion that a state may segregate its voting population according to race, as long as it does so in geometrically pleasing ways. A state violates the Constitution by intentionally denying its citizens equal protection under the law —not by doing so inartfully.

Properly read, *Shaw* is not confined to the principle that the Equal Protection Clause prohibits only racially segregated districts that are bizarrely shaped. It prohibits *any* legislation that, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to

separate voters into different districts on the basis of race." *Shaw*, 113 S. Ct. at 2832.

Hence, the district court correctly determined that the bizarre shape of a district is not the only means of proving intent to racially gerrymander, or for that matter, the only way to make out a prima facie equal protection claim. Irregular shape is *a* beginning of an equal protection claim; it is *one* indication of prohibited overriding racial intent, but not the only indication. For if a district on its face conforms to traditional redistricting values (including shape), but an intent to racially gerrymander is nevertheless established, by other indicia, to have been the overriding consideration in creating the new district, an equal protection claim nevertheless must lie.

As the court below correctly noted, "the requirement for a successful Equal Protection claim is still *intent*, however proved." *Johnson*, 864 F. Supp. at 1374 (emphasis in original). "Foreclosing production of direct evidence of intent until Plaintiffs convince the Court that a district looks so weird that race must have dominated its creation" is not consistent with the logic of *Shaw* or with the Equal Protection Clause jurisprudence of the Court. *Id.* An analytical approach that would make district *shape* a threshold to constitutional claims is neither logically sound nor consonant with precedent, and appellants' arguments to the contrary should be rejected.

* * *

ADL acknowledges that effective minority participation in the political process is both necessary and proper and that inexorable advancement toward that goal is a social good that all must endorse. ADL does not believe, however, that we advance toward that objective by doing violence to fundamental constitutional precepts. To sustain Georgia's third plan against equal protection challenge would be to do precisely that.

The Constitution is a procedural prescription and enunciates no value other than the process of representative self-government. That is necessarily the case for any document intended to serve the span of generations. A value that is generally recognized by one generation may not be generally recognized by the next. *Compare Plessy v. Ferguson*, 163 U.S. 587 (1896), *with Brown v. Board of Educ.*, 347 U.S. 483 (1954). It is not this Court's role to elevate even so pressing a concern as electoral proportionality to the level of a constitutional right. It is rather the Court's duty to review such efforts and, ADL submits, to reject them if they do not fall within the procedural confines of the Constitution.

The Court acts with compelling authority when it reviews legislative action, not in order to vindicate specific substantive values, but rather to ensure that the political mechanisms established in the Constitution are kept open and viable—what John Hart Ely calls "policing the process of representation," assessing challenged statutes enacted by popularly accountable legislatures through a process of "a participation-oriented, representation-reinforcing approach to judicial review." John Hart Ely, *Democracy and Distrust* 87 (1980). Neither the access to, nor the effect of, voting can therefore be manipulated by legislatures on the basis of race.

Consistent with these fundamental principles, the district court correctly struck down Georgia's third redistricting plan.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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